No. 21,337

IN THE

United States Court of Appeals

For the Ninth Circuit

TRI VALLEY GROWERS, formerly known as TRI VALLEY PACKING ASSOCIATION (a corporation),

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

REPLY BRIEF FOR PETITIONER

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1. THE COMMISSION DID NOT HAVE POWER TO ADDUCE ADDITIONAL EVIDENCE WITH RESPECT TO THE TWO ISSUES REMANDED IN CONNECTION WITH THE PRICE DISCRIMINATION CHARGES.

The Commission asserts, in substance, that its action in adducing further evidence with respect to the two issues remanded in connection with the Section 2(a) charges was a proper exercise of discretion entirely consistent with this Court's mandate (Respondent's Supplemental Brief, pp. 16-17[1]). There is implicit in this assertion an admission that *if* its action was in conflict with the mandate the Com-

[1]This brief will be hereinafter referred to as "RSB".

mission was without power to take and consider this evidence. Consequently to establish that the Commission's conduct is incompatible with the Court's directive we shall revert to the precise terms of the Court's opinion dealing with the remand of the 2(a) issues. *National Labor Relations Board v. Donnelly Garment Company,* 330 U.S. 219, 226; 91 L.ed. 854, 861-862(1947).

(a) The causal connection issue.

In remanding the *first* of the two 2(a) issues this Court stated:

> While Tri-Valley presented before the Commission *the factual basis* upon which this argument is made, it did no more than suggest the legal question which it now urges concerning the necessity of a causal connection between price differentials and probable competitive injury. This may explain why the Commission did not deal with the problem in its opinion or *findings.* Nor have Commission counsel dealt with the contention in their brief in this court.
>
> Disposition of this question is dependent upon the facts pertaining to the availability, to nonfavored purchasers, of the low prices for Tri-Valley products on the California Street market, and the application of the law to those facts. *It is not our function to find these facts, and the Commission should first speak as to the application of the law to the facts which are found.* We have therefore concluded that the proceedings should be remanded to the Commission for that purpose unless we can and do determine, on this review, that Tri-Valley established a de-

> fense which exculpates it even if there have been section 2(a) price discriminations.[2]
>
> (329 F.2d 704)

There is nothing in this command or in the accompanying statements explaining its issuance indicating that the Court felt that the evidentiary record then before it was insufficient for the declared purpose of the remand, i.e. *to find the facts and speak as to the application of the law to the facts found.* Accordingly, there was no reason that would impel the Court to authorize the taking of additional evidence or to direct that the evidence already received be reheard. *Ford Motor Company v. National Labor Relations Board,* 302 U.S. 364, 373-374, 83 L.ed. 221, 229-230 (1939). Nevertheless, the Commission insists that this Court clearly indicated that additional evidence could be received, and in an attempt to rationalize this assertion declares:

> A *fair* reading of the Court's opinion supports the interpretation of the Commission and its examiner that "[*i*]*n permitting new findings* as to the Section 2(a) charges, the Court clearly indicated its intention that further evidence could be adduced if necessary." R. XXII, 1907. (RSB, p. 15).

This rationalization has no validity when considered in the light of the Court's opinion remanding the first of the 2(a) issues. The Court had no occasion to permit "new findings" to be made because

[2]All emphasis added to quoted material is supplied by us, unless otherwise indicated.

there were no "old findings". Also the Court was not called upon to authorize the making of "new and additional findings" for the reason that there were no "old and insufficient findings" to be supplemented and clarified. *What the Court noted was that there was a total absence of findings as to this issue,* and consequently it directed that the Commission make findings with respect to this hitherto unexplored area of the evidentiary record. Accordingly, there is no valid premise to support the Commission's conclusion that "the Court clearly indicated its intention that further evidence could be adduced if necessary." Moreover, the evidence then in the record was entirely sufficient to support findings to the effect that the Commission had failed to establish that the Petitioner's discriminations were the proximate cause of competitive injury. With respect to this it should be borne in mind that at no time prior to the filing of its supplemental brief herein (RSB, footnote p. 17) had the Commission ever applied for leave to adduce further evidence to remedy patent defects in its proof. 15 U.S.C. Sec. 21(c).

It is, therefore, submitted that the reception of further evidence as to this issue was unauthorized and unnecessary. *Zdanok v. Glidden Co.,* 327 F.2d 944, 949-950 (2 Cir. 1964), cert. denied 377 U.S. 934, 12 L.ed 2d 298 (1964).

(b) The meeting of competition issue.

In remanding the *second* of the two 2(a) issues this Court said:

In their brief on this appeal the Commission counsel defend the Commission view as stated in the quoted findings, and apparently also the broader view expressed in the Commission's opinion. But Commission counsel also suggest another basis for the determination that the "meeting of competition" defense had not been established. This basis, which may be preferred by Commission counsel since it is presented first, *is that a lowered price is within the proviso of section 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system, such as that represented by the California Street market.*

This would appear to be a threshold question which ought to be resolved before questions concerning the duty of a seller to adduce evidence as to the lawfulness of competitive prices, or as to the seller's knowledge of such lawfulness, are reached. If, as Commission counsel now contend, Tri-Valley was not engaged, in the California Street market, in meeting "an equally low price on a competitor," within the meaning of proviso to section 2(b), that is the end of the matter, insofar as that defense is concerned. What Tri-Valley's duty would be concerning the production of evidence bearing upon the lawfulness of competitive prices then becomes immaterial, for there would be no competitive prices within the contemplation of the proviso.

The Commission should accordingly deal first with this question on the facts and law and, indeed, until it has done so it will not be known whether this court will have to deal with that

> question or any other question concerning the "meeting competition" defense.
>
> A remand of the cause is therefore necessary for further proceedings bearing upon the unresolved price discrimination question to which we have previously referred, *and upon the question of whether the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the "meeting of competition" defense of section 2(b).*
>
> (329 F.2d 706)

This order and the reasons given for its promulgation show that the remand was solely for the purpose of giving the Commission the opportunity of resolving the question "whether the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the 'meeting of competition' defense of section 2(b)."[3] Moreover there is nothing therein that shows that the Court had any misgivings that the evidentiary record then before it was not fully adequate to enable the Commission properly to resolve the legal issue thus entrusted to it. Therefore, there is no reasonable basis for claiming that the Court had tacitly authorized the Commission to augment the record if it was deemed necessary.

The Commission had made *no* findings with respect to the legal issue so remanded, and hence there

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[3]The question thus to be resolved was also phrased by the Court as follows: "[Whether] a lowered price is within the proviso of section 2(b) only if it is made in response to an individual competitive situation and *not* as part of the seller's pricing system such as that represented by the California Street market."

is no basis for arguing that "(i)n permitting *new* findings as to the Section 2(a) charges, the Court of Appeals clearly indicated its intention that further evidence could be adduced if necessary" (RSB, p. 15.) In this connection it is well to remember that the Commission had made no findings that would or would not bring the method of doing business on California Street within the ambit of the pricing system denounced in *Federal Trade Commission v. A. E. Staley Manufacturing Company,* 324 U.S. 746, 89 L.ed 1338 (1945). Cf. *Callaway Mills Company v. Federal Trade Commission,* 362 F. 2d 435, 441-442 (5 Cir. 1966).

Finally, as to both the 2(a) issues remanded it should be noted that the Court *did* limit the Commission's discretion in carrying out the Court's directions because *it did not authorize it* to receive any further evidence with respect thereto. We repeat, therefore, that this being a matter of jurisdiction and not of procedure, the price discrimination issues have returned to this Court in virtually the same evidentiary posture as at the time of its first decision (Petitioner's Supplemental Brief, p. 20).

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2. THE LAW OF THIS CASE PRECLUDES THE CONSIDERATION OF THE NEW FINDINGS OF FACT MADE BY THE COMMISSION.

The Commission describes its numerous "new", new findings regarding the class of purchasers and competition affected by Petitioner's discriminations as being "essentially a recapitulation of findings made previously by the Commission and *affirmed by this*

Court in the prior review proceedings," and having so described them argues that there is no authority "precluding further discussion and recapitulation of findings in a subsequent administrative decision *so long as they are not in conflict with the Court's mandate*" (RSB, p. 14), and it is on this ground that the Commission justifies the tardy importation of these "new", new findings into the proceeding without leave of this Court.

Whether these findings are a mere recapitulation of findings previously approved and consistent with the Court's mandate can be determined by first considering this Court's delineation of the Commission's prior "new findings," and then considering in summary the content of the "new", new findings.

As to the Commission's prior "new findings" this Court said:

> In the findings of fact incorporated in the initial decision of the examiner, it was found generally, and also with respect to seven specified sets of favored and disfavored purchasers, that such purchasers are competitively engaged *in the resale of Tri-Valley products*. Thus, both as to the identity of purchasers and the kind of affected competition, the findings of the examiner did not go beyond what petitioner asserts are the limited allegations of the complaint.
>
> But the Commission, upon its review of the initial decision, *vacated the examiner's findings and entered new findings*. In these *new* findings the class of affected purchasers and the kind of affected competition were not confined to, *nor do they necessarily include,* purchasers who di-

> rectly or indirectly compete with each other in the resale of *Tri-Valley* products, *or competition of that kind. In the new findings the class of affected purchasers was found to be that in which purchasers competed, directly or indirectly, in the resale of canned fruits and vegetables under each purchaser's private label.*[4]
>
> (329 F. 2d 698)

By the foregoing reference to the Court's opinion, it is definitely established that the Commission found through its prior new findings that the class of purchasers affected were those who competed directly or *indirectly,*[5] "in the resale of canned fruits and vegetables under each purchaser's private label."

The majority of the Commission's "new", new findings differ radically from those which this Court affirmed in the first review proceedings. For example, six (6) of these declare, in effect, that the numerous retailer customers of ten (10) disfavored wholesaler-purchasers *compete* with favored retailer-purchasers *"in the sale of respondent's products."* (Finding 10, R. XXII, p. 1884; Finding 11, R. XXII, 1885; Finding 13, R. XXII, 1886; Finding 15, R. XXII, 1886; Finding 17, R. XXII, 1887; Finding 23, R. XXII, 1890). That the difference between the two sets of findings is more than just formal is demonstrable.

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[4]Footnote 8 has been omitted.

[5]"In the context of this case, *'indirect'* competition between purchasers occurs when a retailer who obtains his goods from a disfavored wholesaler-purchaser is in competition with a favored retailer-purchaser." (Footnote 5, 329 F. 2d 698)

The Commission in its first decision while dealing with its first set of findings declared, in substance, that there is *no evidence* that any of the independent retailers "actually sold any of respondent's goods," and therefore reasoned that it was the competition in private label goods purchased from *various canners* that proximately caused the injury to competition between favored retailers and these retailer customers of non-favored wholesalers (Finding 6, R. VI, 574; Opinion, R. VI, 584). On the other hand, the Commission in dealing with its second set of findings reasoned that it was competition in the sale of Petitioner's products—not in the sale of private label merchandise—that proximately caused the injury to the competition between these retailers.

It is apparent therefore that what the Commission has done amounts to more than just a recapitulation of prior findings, and that its "new", new findings are *inconsistent* in basic theory with those approved by this Court. The prior findings thus approved patently *are the law of this case,* and as such they do not permit the litigation and relitigation of issues thereby finally settled.

Most appropriate in their application to the Commission's conduct in this case are the following remarks of the Court of Appeals for the Seventh Circuit in *Morand Bros. Beverage Co. v. National Labor Relations Board,* 204 F. 2d 529, 532 (1953):

> * * * The pronouncements of the reviewing court are then known in the vernacular as "the law of the case", i.e., they are the rules to govern the particular dispute at hand, unless, of course,

the decision of the reviewing court is declared erroneous by a tribunal of competent jurisdiction holding a still more superior position in the judicial pyramid. In such a situation it behooves the inferior arbiter to exercise great care that "the law of the case" is applied to the facts of the case when they have been precisely determined by it. This is so even when it finds itself in well founded disagreement with its reviewer.

There is a most salutary reason for our adherence to this doctrine. While we must take care that improper or ill-conceived decisions be held to a minimum, and, when they appear, be quick to supplant them with sound decisions, we must remember that the particular lawsuit must, at sometime, come to an end. It is conceivable, though admittedly highly improbable, that an individual piece of litigation could be bounced up and down endlessly, from trial to appellate court, merely because of the refusal of the lower body to apply the law as announced by the reviewing one. In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them.

Undaunted by the law of the case, the Commission also contends with respect to the 2(a) charges that new findings are necessary and proper to appraise the scope of the relief that should be granted and to fashion an *appropriate* cease and desist order (RSB, p. 15). In connection with this contention, it is well

to note that the cease and desist order that the Commission fashioned and issued when making its *first* decision is identical to the one it issued when it made its second decision (R. VI, 578; R. XXIV, 2146). It is evident then that the Commission is now wholly aware that its broad and harsh order cannot be justified on the basis of the facts first found by it. Accordingly, if properly to sustain this order additional evidence and findings were necessary, the Commission was required by law to make timely application to this Court for leave to adduce such evidence and to make such new findings (15 U.S.C. 21(c)), but this it did not do.

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3. THE SUPREME COURT'S DECISION IN FRED MEYER, INC., IS NOT APPLICABLE HEREIN.

Ostensibly on the basis of the Supreme Court's opinion in *Federal Trade Commission v. Fred Meyer, Inc.,* 390 U.S. 341, 19 L. Ed. 2d 1222 (1968), the Commission seeks (1) reconsideration of this Court's prior ruling made with respect to the Section 2(d) charges, insofar as it requires a showing of functional competition, and (2) leave further to modify the cease and desist order issued in connection with said charges (RSB, pp. 36-40). The partial reversal in that case of this Court's decision in *Fred Meyer, Inc. v. Federal Trade Commission,* 359 F. 2d 351, did not affect this Court's teaching that a seller's obligations under 2(d) are limited to customers who compete with each other on the same functional level.

Standard Oil Company of California v. Perkins, 396 F. 2d 809, 817-818 (9 Cir. 1968).

The partial reversal of this Court's said decision stems from evidence and findings based thereon which are *not present in this cause.* This is apparent from the following excerpt taken from the opinion of the Supreme Court:

> * * * In the case before us, it is conceded that Meyer was a customer of Tri-Valley and Idaho Canning. *Moreover, as indicated by its approval of the Commission's § 2(a) ruling, the Court of Appeals did not question the Commission's finding that Meyer competed in the resale of Tri-Valley and Idaho Canning products with retailers who purchased through Hudson House* and Wadhams. Given these findings, it was unnecessary for the Commission to resort to the indirect customer doctrine. Whether suppliers deal directly with disfavored competitors or not, they can, and here did, afford a direct buyer the kind of competitive advantage which § 2(d) was intended to eliminate. In light of our holding that "customers" in § 2(d) includes retailers who buy through wholesalers and *compete* with a direct buyer in the resale of the supplier's product, the requirement of direct dealing between the supplier and disfavored competitors imposed by the Court of Appeals rests on too narrow a reading of the statute. *Further, in light of the Commission's finding that Meyer competed in the resale of the* Idaho Canning and *Tri-Valley products with other retailers in the area who purchased through Hudson House* and Wadhams *and in light of the fact that the Court of Appeals did not disturb this finding, the court*

> *misapprehended the Commission's burden in requiring it to trace those products to the shelves of the disfavored retailers.*[6]
>
> (390 U.S. 353-354, 19 L. Ed. 2d 1231)

The findings referred to by the Supreme Court regarding Meyer's *direct* competition in Petitioner's products with other retailers in the area who purchased these goods through Hudson House are based on oral evidence, which is summarized in the opinion of this Court in *Meyer,* as follows:

> But a Portland retailer witness specifically testified that he competed directly, in peaches of the grade and quality purchased from Hudson House, with a nearby Meyer store. * * *
>
> (359 F. 2d 351)

No such witness testified to a similar effect in this case, and consequently the evidence and the findings on which the Supreme Court relied so to partially reverse the decision of this Court in *Meyer* are not operative in *Tri-Valley.*

It is submitted therefore that the Commission's plea for reconsideration and for leave further to modify said order should be denied.

Dated, San Francisco, California,
January 12, 1969.

Respectfully submitted,
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[6]Footnote 19 has been omitted.